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No. 88-660

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SIMKINS INDUSTRIES, INC.,
Petitioner

v.

SIERRA CLUB,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

DAVID F. ALBRIGHT
HARLEY THOMAS HOWELL *
SEMMES, BOWEN & SEMMES
250 W. Pratt Street
Baltimore, MD 21201
(301) 539-5040
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner, Simkins Industries, Inc., pursuant to Rule 22.5, respectfully submits this Reply to the Brief in Opposition filed on behalf of Respondent, Sierra Club.

I. Section 505 of the Clean Water Act Abridges the Article III Requirement of "Redressability" By Authorizing Private Citizens to Seek a Judicial Award of Penalties to the United States Treasury.

The standing inquiry contemplated by Article III of the Constitution is whether the party before the court has " 'such a personal stake in the outcome of the con-

troversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (emphasis in original). The question presented here focuses upon the stake of the Respondent, Sierra Club, which invoked on its own behalf the exercise of federal judicial power to assess civil penalties payable exclusively to the United States Treasury. The penalties imposed against Simkins, authorized by § 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), are non-recoverable by Sierra Club and cannot redress in any meaningful sense the environmental injury claimed on behalf of its members. In our submission, the exercise of the retributive power which Congress has sought to confer upon the federal fiduciary in citizen suits under § 505(a) is gratuitous and offensive to Article III. Petition, at 10-19.

Rather than focus upon the Article III constraints upon its standing to claim penalties to which it is not entitled, Sierra Club attempts to justify its standing to seek equitable relief which was granted:

> In the instant case, Sierra sought two remedies: (1) injunctive relief in the form of a survey of that part of the Patapsco River straddled by the Simkins plant, and (2) an assessment of penalties that would deter Simkins and other industries from acting illegally in the future. Each of the two remedies explicitly redress Sierra's injuries.

Br. in Opposition, at 18. Sierra Club argues that its standing was demonstrated by its unsuccessful quest for injunctive relief. *Id.*, at 18-20.

However, Sierra Club's claim for injunctive or other equitable relief became moot when the District Court denied any such relief (Br. in Opposition, at 6, 20) and Sierra Club failed to preserve that claim for appellate review. *Deakins v. Monaghan*, —— U.S. ——, 108 S.Ct. 523, 528 (1988). Its mooted claim for injunctive relief

leaves unresolved the entirely separate and fundamental question of Article III standing of a private citizen to invoke the judicial power to order payment of penalties to the Treasury. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-09 (1983).

The judgment as rendered and affirmed on appeal imposed $977,000 in penalties, but denied injunctive relief, despite this Court's admonition last term that "§ 505 of the Act does not authorize civil penalties separately from injunctive relief * * *." *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. ——, 108 S.Ct. 376, 382 (1987). The penalties awarded by the judgment, if sustained, would not inure to the benefit of Sierra Club or its members. The penalties are not earmarked for a special fund to survey the Patapsco River or promote any other objective of the Clean Water Act. Congress intended that any penalties would be deposited in the Treasury as miscellaneous receipts, available for disbursement as governmental expenditures unrelated to environmental projects. Petition, at 10-13.

Sierra Club also argues that this Court has considered the same Article III redressability contention in *Gwaltney* and other cases. Br. in Opposition, at 20-28. Sierra Club's argument lacks any support in the passages quoted from prior opinions. In *Gwaltney*, for example, this Court reaffirmed that, *at the pleading stage*, allegations of injury are sufficient to invoke federal jurisdiction. *Id.*, 108 S.Ct. at 385. However, *Gwaltney* also teaches that, before judgment is rendered, "the plaintiff must prove the allegations in order to prevail." *Id.*, at 386. Furthermore, in order to demonstrate Article III standing, proof of injury will not alone suffice: "Our cases recognize that a mere showing of personal injury is not sufficient to establish standing; we have also required that the injury be 'fairly traceable to the defendant's allegedly unlawful conduct *and likely to be redressed by the requested*

relief'." *Meese v. Keene*, 481 U.S. ——, 107 S.Ct. 1862, 1869 (1987) (emphasis supplied), quoting from *Allen v. Wright*, 468 U.S. 737, 751 (1984). *Gwaltney* had no occasion to reach the redressability question here presented.[1]

Nothing in any prior decision of this Court suggests that Congress, in enacting § 505(a), was at liberty to abrogate the Article III redressability component of standing. See Petition, at 14-15. Nothing in any prior decision of this Court supports the holding below that injury is likely to be redressed by judicial relief which serves no conceivable interest apart from its raw potential for deterrence. See Petition, at 17-19. We submit that the fundamental question of Article III redressability is trivialized by Sierra Club's far-fetched assertions that the question has already been resolved. It is a question which Congress itself has generated and which was identified at the outset of this case and preserved for review by this Court. It now deserves a definitive answer.

II. In Its Review of a Summary Judgment Rendered in Direct Conflict With this Court's Decision in *Gwaltney* the Court of Appeals Erred by Finding a Continuing Violation of the Act Never Charged By Complaint or Motion and Negated by the Unchallenged Findings of Fact.

We stand firm upon our position that the decision below was repugant to this Court's decision in *Gwaltney*. This error was compounded by the Fourth Circuit's unwillingness to consider the jurisdictional allegations of the complaint, the legal basis for summary judgment as to liability, and the findings of fact on which the penalty was assessed. Petition, at 20-28. Sierra Club's blatant

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[1] Sierra Club insists that in *Gwaltney*, "this Court made it clear that citizens in Clean Water Act cases may seek penalties payable to the United States Treasury." Br. in Opposition, at 21. The passage cited by Sierra Club was part of this Court's recitation of the statutory provisions, *Gwaltney*, 108 S.Ct. at 379, not a pronouncement that the statutory authority satisfied the Article III redessability prerequisite to citizen suits.

distortions of the record [2] are indicative of the vulnerability of the judgment it attempts to support.

Complaint. The sole violation of the Clean Water Act charged in the complaint consisted of the past failure to file a series of discharge-monitoring reports (DMRs). The last alleged violation occurred more than six months before suit was filed.

Sierra Club urges that it made a "good faith" jurisdictional allegation of continuing violations, as *Gwaltnay* requires (108 S.Ct. at 385). Br. in Opposition, at 8-9. However, the only such allegation was set forth in a pre-suit letter (App. 76a) and, even in that letter, the only violations stated had occurred months in the past. App. 76a-78a. Although the letter was later appended to the complaint as an exhibit, the complaint itself omitted any reference to a continuing violation. Instead, in invoking jurisdiction under § 505(a), the complaint merely alleged that Simkins "has violated" its permit. App. 74a. Further light on Sierra Club's "good faith" in pleading subject-matter jurisdiction is revealed by its motion for partial summary judgment, which predicated liability on the sole ground that Simkins "has violated the Clean Water Act" by its past failure to file DMRs (J.A. 68).

The "good faith" pleading requirement in *Gwaltney* was linked inextricably to the sanctions of Rule 11, Federal Rules of Civil Procedure. *Gwaltney*, 108 S.Ct. at

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[2] For example, Simkins refers in its "Statement of Facts" to "a copper level in the Patapsco at a level 10,000 times the safe level for fresh water, and an oil and grease level two times the maximum limit allowed under Simkins permit." Br. in Opposition, at 3. The District Court made no such finding.

Sierra Club's statement is drawn from testimony by its expert witness during the *penalty* phase of the case. In fact, the same witness conceded on cross-examination that the amount of copper discharge did *not* violate the Simkins permit (J.A. 180, 194) and that the levels of grease and oil were *not* in excess of permit limits (J.A. 189-90). In addition, the Sierra Club witness agreed that his own environmental standards were far more stringent than those imposed by the Simkins permit (J.A. 181).

385. It is the jurisdictional allegations of the *complaint* that are to be tested by Rule 11. The letter mailed before suit was not subject to Rule 11, but the jurisdictional allegation of the complaint was governed by Rule 11. Sierra Club's argument, as adopted below, would eliminate Rule 11 from the *Gwaltney* equation. The complaint manifestly failed to contain the requisite jurisdictional allegation. It should have been dismissed under the settled rule that jurisdiction must be distinctly alleged and may not be inferred argumentatively from the pleadings. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 547 (1986), and cases cited therein.

Summary Judgment. With respect to liability for violations of the Act, Sierra Club asserts that "[t]he trial court properly granted summary judgment on the facts before it" and "considered uncontroverted evidence that Simkins was continuing to violate the Clean Water Act, not only when Sierra Club filed suit, but also at the time of trial." Br. in Opposition, at 10. This assertion is ludicrous on its face.

In fact, Simkins was *deprived* of a trial on the issue of its liability by the erroneous entry of summary judgment. The District Court ruled "that defendant has failed to file DMRs in the past" and "thus violated its permit requiring such reporting." App. 39a. Summary judgment was granted because Simkins "failed to file DMRs as required by its permit prior to receiving plaintiff's [pre-suit] 60-day letter." App. 40a-41a. In so ruling, the Court did *not* consider any evidence of continuing violation. On the contrary, the Court rejected proffered evidence of Simkins' ongoing compliance: "That defendant is now complying with [its] NPDES permit is irrelevant to plaintiff's cause of action." App. 39a.

In short, Simkins was held liable for wholly past violations. In adjudicating that liability on summary judgment, the District Court made no finding that such violations continued after suit. Under the *Gwaltney* de-

cision, as construed by the Fourth Circuit, liability presupposes "a direct finding as to whether citizen-plaintiffs proved the existence of intermittent or sporadic violations constituting an ongoing violation." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 172 (4th Cir. 1988). No such finding was made (or possible) on the record existing when summary judgment was entered.

Sierra Club here attempts to justify summary judgment on liability by argumentative references to matters unsupported by the record on summary judgment. The bench trial to which it refers was limited in scope to the amount of penalties (App. 42a, 45a, 65a), after liability had been previously adjudicated. At no stage, however, did the District Court find a continuing violation. There was no evidence to support any such finding.

It was undisputed that Simkins was guilty of wholly past violations of the DMR reporting requirement. That was the sole issue resolved by summary judgment. However, it was also undisputed that Simkins was doing all that its permit required, even before suit was filed, and has remained in full compliance ever since. If Simkins had been charged with ongoing violations, contrary to the facts, then summary judgment would have been factually inappropriate and liability would have been submitted to a jury for decision. By refusing to vacate the improper grant of summary judgment, the decision below defied *Gwaltney* and denied Simkins its Seventh Amendment right to have a jury adjudicate the issue of liability. *Tull v. United States*, 481 U.S. ——, 107 S.Ct. 1831, 1839 (1987). See *United States v. M.C.C. of Florida, Inc.*, 848 F.2d 1133 (11th Cir. 1988).

Continuing Violation Theory. Sierra Club repeatedly asserts that Simkins' wholly past failure to file DMRs constitutes a "continuing violation" of the Clean Water Act. Br. in Opposition, at 10, 11, 12, 14, 16. It alludes to "uncontroverted evidence" to that effect (*id.*, at 10, 11,

14, 15n.8, 16), but conspicuously refrains from citing any finding of fact which supports its conclusion.

The omission is significant to this Court's review. In fact, after trial, the District Court made detailed findings of fact on the penalties to be assessed for past violations. App. 46a-53a. *At no point did the Court find any fact which would support a conclusion that the past violations were allowed to continue beyond the filing of suit or that there was any likelihood of future repetition.* It is especially noteworthy that Sierra Club was invited to submit proposed findings of its own and that the District Court's factual findings reflected the submissions of the parties. App. 45a-46a. Neither the opinion by the Fourth Circuit nor the Brief in Opposition suggests any deficiency in the findings of fact, much less challenges any finding as being clearly erroneous. See Petition, at 23-26.

Sierra Club attempts an analogy to the Internal Revenue Code and assumes that the failure to file tax returns is treated as a continuing violation. Br. in Opposition, at 12. The analogy does not fit citizen suits under the Clean Water Act. Because DMRs merely document wholly past monitoring results, a citizen suit predicated upon pre-suit filing failures would bear no relation to current abatement, the sole justification for § 505 suits. *Gwaltney*, 108 S.Ct. at 382-83. Moreover, the "continuing residual effects" of a permit violation do not transform it into a continuing violation. *Hamker v. Diamond Shamrock Co.*, 756 F.2d 392, 397 (5th Cir. 1985). In most other contexts, the past failure to file required reports or maintain records does not constitute a continuing violation. See, e.g., *Toussie v. United States*, 397 U.S. 112, 115 (1970); *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977); *Pope v. Bond*, 641 F.Supp. 489, 496 (D.D.C. 1986); *Childress v. Northrop Corp.*, 618 F.Supp. 44, 47 (D.D.C. 1985); *Davis v. Edgemere Finance Co.*, 523 F.Supp. 1121, 1123 (D. Md. 1981). Sierra Club (as well as the decision below) is simply wrong in assuming the contrary.

CONCLUSION

For each of the reasons stated in the Petition, as well as those stated herein, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

DAVID F. ALBRIGHT
HARLEY THOMAS HOWELL *
SEMMES, BOWEN & SEMMES
250 W. Pratt Street
Baltimore, MD 21201
(301) 539-5040
Counsel for Petitioner

* Counsel of Record

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